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CONTRIBUTORY NEGLIGENCE OF CHILDREN IN INDIANA: CAPACITY AND STANDARD OF CARE

There appear to be two major views in the United States today concerning the issue of contributory negligence of children.¹ These are usually denominated as the Illinois rule and the Massachusetts rule.² It is not the purpose of this note to make an exhaustive study of cases in the various states or even to determine which is the majority rule. The purpose is to examine the cases in Indiana and determine which, if either, of the rules the Indiana courts follow. In discussing the doctrine of contributory negligence of children, it is important at the outset to distinguish between the terms capacity and standard of care. Generally when a court is speaking of a child's capacity, it is referring to his ability to realize and appreciate a given danger or risk; but when it speaks of a standard of care it means the standard to which the child will be held after it is determined that he has the required capacity.

The Massachusetts rule, as generally stated, is that a child, regardless of age, is held to the same standard of care which is ordinarily exercised under similar circumstances by children of the same age, intelligence, and experience.³ Whether or not this standard has been met is a question of fact and must be determined by the jury.⁴ Many states follow the same rule but alter the language slightly, substituting capacity,⁵

1. Cf. Wilderman, *Presumptions Existing in Favor of the Infant in Re: The Question of an Infant's Ability to be Guilty of Contributory Negligence*, 10 IND. L.J. 427 (1935).

2. See 5 FORDHAM L. REV. 367 (1936).

3. E.g., *Giacobbe v. Boston Elevated Ry.*, 215 Mass. 224, 102 N.E. 322 (1913).

4. *Ibid.*

5. *Braswell v. Smith*, 27 Ga. 623, 110 S.E. 415 (1921).

discretion,⁶ prudence,⁷ or appreciation⁸ for either intelligence or experience.⁹

The Illinois rule, on the other hand, is analogous to the rule regarding a child's capacity to commit a crime. In criminal cases courts generally hold that a child under the age of seven cannot be guilty of a crime; from seven to fourteen, there is a presumption that he cannot be guilty of a crime; and over the age of fourteen, he is chargeable for his crimes as an adult.¹⁰ Thus, the jurisdictions that follow the Illinois rule usually hold that a child under the age of seven years cannot be charged with contributory negligence. When a child is between the ages of seven and fourteen, however, the criminal law presumption usually is not followed.¹¹ In this age group the question of a child's culpability is a question of fact for the jury which must consider the age, intelligence, capacity, and experience of the child.¹² It has been said that jurisdictions which follow the Illinois rule hold a child over the age of fourteen to the same standard of care as an adult, but this is usually not done unless the age, intelligence, capacity, and experience of the particular child are such that he should be held to that standard of care.¹³ Although the Illinois rule is called the "arbitrary age limits rule," it should be noted that it is only a slight modification of the Massachusetts rule.¹⁴

The cases in this area generally arise when a tort action for damages is brought for a child's injuries or for his wrongful death.¹⁵ The de-

6. *Douga v. Ancona Baking Co., Inc.*, 193 So. 271 (La. App. 1940).

7. *Waterbury v. Elysian Spring Water Co.*, 139 Cal. 355, 33 P.2d 1048 (1934).

8. *Armer v. Omaha & Council Bluffs St. Ry.*, 151 Neb. 431, 37 N.W.2d 607 (1949).

9. Other states follow the Massachusetts rule exactly as stated above. See *McKay v. Hedger*, 139 Cal. 266, 34 P.2d 221 (1934); *O'Donnell v. Booth & Flinn*, 302 Penn. 92, 152 A. 749 (1930); *Neves v. Newtzow*, 64 R.I. 395, 12 A.2d 660 (1940); *Cameron v. Miller*, 43 S.D. 429, 180 N.W. 71 (1920); *Yeary v. Holbrook*, 171 Va. 266, 198 S.E. 441 (1938).

10. *E.g.*, *State v. Fisk*, 15 N.D. 589, 108 N.W. 485 (1906).

11. *Contra*, 19 OHIO ST. L.J. 769 (1958).

12. *Cf.* *Wolczek v. Public Service Co.*, 342 Ill. 482, 174 N.E. 577 (1930); *Kremer v. Vim Co.*, 306 Ill. App. 476, 28 N.E.2d 811 (1940); *Cosmo v. Seegers*, 307 Ill. App. 187, 30 N.E.2d 123 (1940).

13. *Binder v. Chicago City Ry.*, 175 Ill. App. 503 (1912). Sometimes the courts only require a child over the age of fourteen to exercise that degree of care and caution which children of his age, capacity, intelligence, and experience may reasonably be expected to use under like circumstances. See *Peterson v. Chicago Consol. Traction Co.*, 231 Ill. 324, 83 N.E. 159 (1907); *Chicago City Ry. v. Tuohy*, 95 Ill. App. 314 (1901).

14. A child under the age of seven will rarely be found contributorily negligent. Also between seven years and fourteen years the operation of the two rules is practically the same. It is only concerning children over fourteen years that any great difference develops, and even in this area the cases following contrary standards often reach the same result.

15. There are so few cases that involve the liability of a child defendant for negligence that it is difficult to determine if he must meet the same standard of care as is required where the question is one of contributory negligence. The Restatement

fendant alleges that the child was contributorily negligent which raises the question of the standard of care to which the child is to be held.¹⁶ The Indiana decisions on this point are confusing and contradictory. Much discussion of the standard of care is dicta, and the only certainty derived from a study of the cases is that Indiana does not seem to follow either of the two rules consistently but has attempted to adopt the good aspects of each.¹⁷

In the early Indiana decisions, the standard of care for children was clearly that a child need only exercise such care and discretion as is reasonably to be expected from children of his age.¹⁸ In one case the court added that the amount of care required of a particular child in a specific set of facts was usually a question for the jury, but that the court would decide the question as a matter of law where there was no doubt as to the capacity of the child (at either age extreme).¹⁹ The court concluded that when it can be held as a matter of law that the injured child is incapable of being contributorily negligent because of his tender years, there is no necessity to prove that the child was not at fault; but when a child is

of Torts has adopted the Massachusetts rule, but it is indicated by an analogy to contributory negligence on the part of young children. RESTATEMENT, TORTS, Explanatory Notes § 167, comment e at 29-30 (Tent. Draft No. 4, 1929). Although it may be that children should not be required to conform to a particular standard in order to relieve an admittedly negligent defendant from liability to them, it does not necessarily follow that a child should not be required to conform to a higher standard of behavior where it is necessary for the protection of innocent members of the public. On the whole, the contributory negligence cases do not seem to show an undue regard for the inevitable inferiorities of children so it is probably safe to accept the same standard for child defendants. The Indiana courts generally hold that an infant is liable for his torts, but no discussion of his standard of care has been found. *E.g.*, *Butler Bros. v. Snyder*, 81 Ind. App. 44, 142 N.E. 398 (1923); *Daugherty v. Reveal*, 54 Ind. App. 71, 102 N.E. 381 (1913); *Udell v. Citizen St. Ry.*, 152 Ind. 507, 52 N.E. 799 (1899); *Peterson v. Haffner*, 59 Ind. 130, 26 A.R. 81 (1877). For an excellent discussion of this point see Shulman, *Standard of Care Required of Children*, 37 YALE L.J. 618 (1928). See also 30 ST. JOHNS L. REV. 119 (1956); Bohlen, *Liability In Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1925).

16. In early Indiana cases the doctrine of imputed negligence was an important element. The imputed negligence rule was that whenever a child was exposed to danger by his parents, his parents were negligent and such negligence would be imputed to the child. *Lafayette & Indianapolis R.R. v. Huffman*, 28 Ind. 287 (1867); *Pittsburg, Fort Wayne, & Chicago R.R. v. Sears*, 11 Ind. App. 654, 38 N.E. 837 (1894). The cases allowing imputed negligence were overruled, but the parent's negligence was still a defense in wrongful death actions. *Evansville v. Senhenn*, 151 Ind. 42, 17 N.E. 634 (1898). For a more recent case see *Union Traction Co. v. Gaunt*, 193 Ind. 109, 135 N.E. 486 (1922). Cf. 23 YALE L.J. 553 (1914).

17. See Wilderman, *Presumptions Existing in Favor of the Infant in Re: The Question of an Infant's Ability To Be Guilty of Contributory Negligence*, 10 IND. L.J. 427 (1935).

18. See *Indianapolis, Peru, & Chicago Ry. v. Pitzer*, 109 Ind. 179, 6 N.E. 310 (1886); *Terre Haute St. Ry. v. Tappenbeck*, 9 Ind. App. 422, 36 N.E. 915 (1893).

19. *Terre Haute St. Ry. v. Tappenbeck*, *supra* note 18.

above this age, such proof is necessary.²⁰ It is important to note that there are two situations in which a court may rule as a matter of law as to a child's contributory negligence. First, a court may hold that a child is not contributorily negligent because he does not have the requisite capacity. Secondly, a court may rule that a child is or is not contributorily negligent, after first deciding that he has the requisite capacity, when the evidence is so overwhelming either way that it is evident that he has or has not met the required standard of care.

Although consistently following the Massachusetts rule before the turn of the century, the Indiana courts were not without confusion on other points. One of these was the use of the terms *sui juris* and *non sui juris*.²¹ These terms are generally not tort terms but refer to the ability or lack of ability to manage one's own affairs—some sort of legal capacity.²² Perhaps it is the idea of "capacity" that first tempted the usage in tort law. Although the use in Indiana is confused, these terms seem primarily intended to denote if a particular child is contributorily negligent. It has been held that if a child were *non sui juris*, he would be incapable of being contributorily negligent. Thus it would seem that if a child were *non sui juris*, any standard of care would be irrelevant. The cases, however, have not been consistent with this premise. In one case, in which the plaintiff's three year-old child had been killed by the negligent operation of the defendant's streetcar, the court held that due to the child's tender age he was *non sui juris* and therefore incapable of contributory negligence. The court added, however, that a child was required to exercise only such care and discretion as could reasonably be expected of a child of his age and intelligence.²³ The latter statement is obviously inconsistent with the former, since a child can not be incapable of contributory negligence and still be held to a standard of care. If the *sui juris-non sui juris* distinction is accepted, the rule should be simply that a *non sui juris* child cannot be contributorily negligent.²⁴

The exact age a child must reach before he may not be ruled *non sui*

20. As mentioned before, this was proved by showing that the child had exercised the same care as children of his age, intelligence, and experience would have exercised. See text accompanying note 18 *supra*.

21. See *Cleveland, Cincinnati, Chicago & St. Louis R.R. v. Miles*, 162 Ind. 646, 70 N.E. 985 (1903); *Baltimore & Ohio S-Western R.R. v. Hickman*, 40 Ind. App. 315, 81 N.E. 1086 (1907); *Elwood Elec. St. R.R., v. Ross*, 26 Ind. App. 258, 58 N.E. 535 (1900); *City of Elwood v. Addison*, 26 Ind. App. 28, 59 N.E. 47 (1900).

22. STORY, COMMENTARIES ON AGENCY § 2 (9th ed. 1882).

23. *Indianapolis St. Ry. v. Schomberg*, 164 Ind. 111, 72 N.E. 1041 (1905).

24. See *Fuller v. Trun*, 109 Ind. App. 407, 31 N.E.2d 670 (1941); *Citizens' St. R.R. v. Stoddard*, 10 Ind. App. 278, 37 N.E. 723 (1894); *Kostenbom v. N.Y. City Ry.*, 105 N.Y.S. 65, 120 App. Div. 160 (1907).

juris as a matter of law is uncertain.²⁵ One case held that a seven year-old boy who crawled upon the defendant's railroad track and went to sleep had enough intelligence and appreciation to be charged with contributory negligence.²⁶ In another case a seven year-old girl who lived near a railroad and had been warned of danger from trains was not allowed to recover because of her contributory negligence.²⁷ It therefore seems that a child must be below the age of seven in order to be *non sui juris*; but at just what age is uncertain.²⁸

The courts have often said that if a child is *sui juris* he is chargeable as a matter of law with the consequences of his act as an adult.²⁹ If this were correct, a *sui juris* child would be held to the reasonable prudent man standard. However, a finding of *sui juris* in these cases has resulted in more than the establishment of a standard; simply by the use (or misuse) of the Latin phrase, without further explanation, the court is holding that the child is contributorily negligent. Thus the holding is that a *sui juris* child is contributorily negligent with "*sui juris*" being used as the sole basis of the court's holding.³⁰ On the other hand, in one case, in which the defendant had gotten the child plaintiff drunk against the latter's will and was injured along with the plaintiff when the buggy which the plaintiff was driving overturned, the court said that a *sui juris* child is capable of exercising some care and discretion but is not held to the same standard of care as a person of mature years. He is only held to the standard of care of children of the same age, knowledge, and experience.³¹ In the former cases the courts seem to use *sui juris* as a standard of care, but in this case (in which the defendant was responsible for the child's intoxication) *sui juris* was used as a measure of the child's capacity before he could be held to any standard of care.

Whether a child is *sui juris* is usually a question of fact for the jury—if a jury finds the child did realize the danger, he is *sui juris* and contributorily negligent, but if it finds he did not realize the danger, he is

25. Cf. 14 MD. L. REV. 167 (1954).

26. *Krenzer v. Pittsburg, Cincinnati, Chicago, & St. Louis R.R.*, 151 Ind. App. 587, 52 N.E. 1013 (1898).

27. *Dull v. Cleveland, Cincinnati, Chicago, & St. Louis R.R.*, 21 Ind. App. 571, 52 N.E. 1013 (1898).

28. Whether the court followed the Massachusetts or Illinois rule in the *Dull* and *Krenzer* cases would have made no difference in the results.

29. See *Cleveland, Cincinnati, Chicago, and St. Louis R.R. v. Miles*, 162 Ind. 646, 70 N.E. 985 (1903); *Brush v. Public Service Co.*, 106 Ind. App. 554, 21 N.E.2d 83 (1939); *Kent v. Interstate Public Service Co.*, 97 Ind. App. 13, 168 N.E. 465 (1932); *Elwood Electric St. R.R. v. Ross*, 26 Ind. App. 258, 58 N.E. 535 (1900); *City of Elwood v. Addison*, 26 Ind. App. 28, 59 N.E. 47 (1900).

30. Cf. *Kent v. Interstate Public Service Co.*, *supra* note 29; *Brush v. Public Service Co.*, *supra* note 29.

31. *Cole v. Seafross*, 49 Ind. App. 334, 97 N.E. 345 (1912).

non sui juris and not contributorily negligent.³² It has already been pointed out that the court can rule on this issue as a matter of law.³³

By the use of these concepts the courts have confused the law in Indiana. First, the terms have not been used consistently. They have been given several meanings so that neither seems definable. Secondly, these terms have no real place in this field of law. A jury, after proper instructions, can decide the issue of contributory negligence without the use of *sui juris* and *non sui juris*; and without doubt the court has the power to rule on contributory negligence as a matter of law when the facts presented warrant such a ruling. It would seem, therefore, that these concepts have no place in any standard of care, since their use tends to confuse both the court and jury.³⁴

After the turn of the century, any consistency in the Indiana decisions as to the standard of care of children disappeared following the decision in *Bottorff v. South Construction Company*.³⁵ In that case, although the holding was based on proximate cause, the Indiana Supreme Court stated:

It has been laid down by law writers and the courts that the time of infancy is divided into three distinct periods, during each of which different presumptions prevail; the first period is that up to the age of seven years, during which the infant is conclusively presumed to be incapable of understanding the nature of crime and can in no way be held responsible therefor; the second is that between the ages of seven and fourteen years. An infant between these ages is presumed to be incapable of committing crimes, but the presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware

32. *Carmody v. Reed*, 60 Ind. App. 662, 111 N.E. 317 (1915).

33. See text accompanying note 19 *supra*.

34. The doctrine of attractive nuisance has also been confused by the Indiana courts. An early case held that an occupant assumes an obligation to a licensee on his premises by invitation to keep the premises in a reasonably safe condition, and that this invitation may be either expressed or implied. When children are involved, certain objects on the occupant's property may bring about this implied invitation; and if the child is attracted to the premises by such an object, the owner has constructive knowledge of his presence and must therefore use his property in such a manner as not to injure the child. *Cleveland, Cincinnati, Chicago, & St. Louis Ry. v. Means*, 59 Ind. App. 383, 104 N.E. 785 (1942). The doctrine has been limited in Indiana so that it does not apply to those dangerous conditions which are obvious and common to nature against which children are presumed to have received early instruction, *i.e.*, bodies of water. *Anderson v. Reith-Riley Const. Co.*, 112 Ind. App. 170, 44 N.E.2d 184 (1942). Recently strong dissenting opinions have appeared and the voices against this limitation on the doctrine are growing. See *Plotzki v. Standard Oil Co.*, 228 Ind. 518, 92 N.E.2d 632 (1950). See also 107 U. P. A. L. REV. 740 (1959).

35. 184 Ind. 221, 110 N.E. 977 (1915).

of the nature of the act. The third period is after the age of fourteen years when the infant is presumed to be capable of committing a crime and can be held the same as an adult. *It seems that the greater weight of authority is to the effect that the same rule applies in negligence cases.* (Emphasis added.)³⁶

The intended effect of the above italicized sentence is uncertain. The criminal law rule's applicability in negligence cases was not in issue in the *Bottorff* case. Perhaps the court's intention in stating this dictum was to establish the Illinois rule of arbitrary age limits as the proper standard of care for children; on the other hand, it could have intended to use the arbitrary age limits to determine a child's capacity for perception of the risk before any standard of care is applicable. Several subsequent cases, however, have used the *Bottorff* case as precedent for establishing the Illinois rule as the standard of care for children in Indiana.³⁷

In *Kent v. Interstate Public Service Company*,³⁸ the plaintiff administratrix unsuccessfully sued for the wrongful death of her son allegedly caused by the defendant's negligence in maintaining its electric wires. The deceased was killed when he climbed to the top of an iron bridge and, while walking the top girder, grabbed an uninsulated wire which either electrocuted him or caused him to fall to his death below. In affirming the lower court's decision, the Appellate Court said: "Appellant's decedent was a bright, healthy boy age fourteen years and five months at the time of his injury and therefore *sui juris* under the law of Indiana, and chargeable as a matter of law with the consequences of his acts as an adult." (Citing *Bottorff*.)³⁹

Perhaps this case and the later ones which followed the same rule tend to show that Indiana has adopted the Illinois rule. However, it is possible that the Illinois rule was modified in the *Kent* case since the court qualified the holding with the adjectives "bright" and "healthy." In a similar case a sixteen year-old boy was killed when he walked across the top girder of an iron bridge and grabbed the defendant's uninsulated electric wires.⁴⁰ It was proved that the boy's education was that of a twelve year-old. The court held that he was not chargeable with contri-

36. *Id.* at 227, 110 N.E. at 983.

37. Although the *Bottorff* case and subsequent cases bring the Illinois rule into Indiana concerning children over fourteen, no cases have been found in which the courts use presumptions in favor of a child between the ages of seven and fourteen.

38. 97 Ind. App. 13, 168 N.E. 465 (1932).

39. *Id.* at 19, 168 N.E. at 471. Similar facts were present in *Brush v. Public Service Co.*, 106 Ind. App. 554, 21 N.E.2d 83 (1939), which stated the same rule and cited the *Bottorff* and *Kent* cases as authority.

40. *Wise v. Southern Ind. Gas & Electric Co.*, 109 Ind. App. 681, 34 N.E.2d 975 (1941).

butory negligence as a matter of law because he did not have the mentality of a fourteen year-old. In another case, an eighteen year-old boy was injured when he climbed the defendant's tower for high voltage wires.⁴¹ The boy, however, was deaf and dumb and had the mental capacity of a six year-old. The court held that he was in fact a child without discretion and therefore should be held to the same standard of care as are children of like mental capacity and judgment. Although the modified Illinois rule of the *Kent* case would have produced the same results, it should be pointed out that these cases followed the Massachusetts rule.⁴² It seems certain that even if the *Bottorff* case were an attempt to set up arbitrary age limits as a standard of care for children, the later modifications have brought the rule more within the line of earlier cases.⁴³

The best analysis of the standard of care required of children appears in *Indianapolis Railway Inc. v. Williams*.⁴⁴ The plaintiff was a fourteen year-old boy who was injured when his bicycle collided with the defendant's trackless trolley car. Defendant claimed that because the plaintiff was fourteen years of age he was *sui juris* and therefore chargeable as an adult with the consequences of his act. The Appellate Court discussed at length *Bottorff*, *Kent*, and *Brush v. Public Service Company*⁴⁵ which the defendant cited as controlling authority for his position. The court distinguished the *Bottorff* case by saying that there the Supreme Court only discussed the capacity of a normal fourteen year old to be held liable to respond in damages for any negligent act or tort, not the applicable standard to determine a child's contributory negligence. In discussing the *Brush* case, the court stated again that the language, "considering that appellant is *sui juris*, and as a matter of law charged with the consequences of his act as an adult," applied only to the question being considered, *viz.*, the minor's capability of being charged with contributory negligence, not the standard of care required of minors. The *Kent* case was distinguished on the same ground. The court then stated that the true rule in Indiana is that the standard of care required of a child is the care that children of like age, knowledge, judgment, and experience would ordinarily exercise under like circumstances. In essence, the *William's* case held that in order for a child to be charged with contributory negligence, the defendant must prove first, that the child had the ability to realize and appreciate the danger, and secondly, that the child's

41. *Harris v. Indiana General Service Co.*, 206 Ind. 351, 189 N.E. 410 (1933).

42. See Note, 1 ARK. L. REV. 293 (1942).

43. Cf. *Niegos v. Indiana Harbor Belt R.R. & New York Cent. R.R.*, 124 Ind. App. 430, 116 N.E.2d 550 (1953).

44. 115 Ind. App. 383, 59 N.E.2d 586 (1944).

45. 106 Ind. App. 554, 21 N.E.2d 83 (1939).

conduct was below that of an ordinary child of like age, intelligence, and experience.

This explanation of the prior cases is sound only if the *Bottorff* dictum was referring to a child's capacity. It is even more doubtful if this reasoning can be used to explain the *Brush* and *Kent* cases. It is impossible to determine whether the courts were speaking only of a child's capacity or were establishing a standard of care. The arbitrary age limits rule is a recognized criterion of legal responsibility in some jurisdictions, and it seems more likely that these cases were simply adopting this rule.

The purpose of a distinct standard of care for children is to make allowance for the child's immaturity in judging his contributory negligence. If the court uses the Massachusetts standards a child will be judged according to his own intelligence, experience, and mental ability with respect to capacity to perceive the risk. Once given this perception of the risk, the child can be held to exercise the judgment of the standard child having like qualities.⁴⁶ This rule accurately observes that a child can be so young as to be incapable of exercising any of those qualities of attention, intelligence, and judgment which are necessary to perceive a risk and to realize its unreasonable character. On the other hand, it discerns that a child who has not yet attained his majority may be as capable as an adult of exercising the qualities necessary to the perception of a risk and the realization of its unreasonable character.⁴⁷ Between these two extremes there are children whose capacities are infinitely varied. This standard can be given as an instruction to the jury and permits the court to rule at either extreme as a matter of law. It has been adopted by the Restatement of Torts.⁴⁸

The Illinois rule is too arbitrary and mechanical.⁴⁹ There appears to be no correlation between a child's sense of right and wrong and his perception of risk. While this rule has the merit of simplicity, it lacks the sanction of reason and experience. The court should consider, and cause the jury to consider, the fact that some children learn, grow, and mature more quickly than others. It is a matter of common knowledge that many children under seven have some understanding of situations affecting their personal safety. Therefore, the age or stage of development at

46. 2 HARPER & JAMES, LAW OF TORTS 924, § 16.8 (1956).

47. RESTATEMENT, TORTS, Explanatory Notes § 167, comment *e* at 28 (Tent. Draft No. 4, 1929).

48. *Ibid.*

49. *Contra*, Wilderman, *Presumptions Existing in Favor of the Infant in Re: The Question of an Infant's Ability to be Guilty of Contributory Negligence*, 10 IND. L.J. 427 (1935).

which a child should be deemed capable of exercising judgment and discretion respecting his personal safety is, from its very nature, incapable of arbitrary determination. The test of age alone is not sufficient because much depends upon the circumstances of the particular case, especially the mental development and previous training and experience of the child.⁵⁰

The confusion in this area of law in Indiana is not eliminated even if the distinction made in the *Williams* case is accepted. The confusion of *sui juris* and *non sui juris* still exists because the courts seem to use these terms both as a capacity for liability and as a standard of care. To rid Indiana of this confusion, *sui juris* and *non sui juris* must either be clearly defined or completely disregarded. The latter seems to be the better course since these terms appear to have no value or pertinency in the law of contributory negligence of children. Also the question of at what age a court can rule a child capable or incapable of contributory negligence as a matter of law is not clear. It appears that Indiana, in trying to adopt the good aspects of each rule, has reaped more harm than benefit, and that a choice between one of the two rules must be made.⁵¹ In the final analysis, confusion remains not only because there is uncertainty as to which of the standards is legally valid, but also because the Indiana courts have not been discriminatory in their application of either standard. Clarification of this confusion requires that the supreme court take the initiative and, at the first opportunity, set up rational standards which can be followed in future litigation, *viz.*, (1) a standard of legal responsibility and (2) a standard of care imposed on children legally responsible.

50. See *Dupius v. Heider*, 113 Fla. 679, 152 So. 659 (1933). *Accord*, *Shulman, Standard of Care Required of Children*, 37 YALE L.J. 618 (1928).

51. See 5 FORDHAM L. REV. 367 (1936).